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The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund

Michael Dore*

I. Introduction

Environmental tragedies involving hazardous wastes¹ have prompted calls for a comprehensive federal program to regulate hazardous waste disposal.² While some states had extensive legislative schemes for waste disposal,³ the absence of regulation in many states and the multistate nature of the problem have led to substantial federal efforts in this area. After some rather tentative initial efforts,⁴ Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund).⁵ Superfund provides for both a comprehensive regulatory scheme for, and a revenue procedure to fund federal responses to, releases of hazardous substances.⁶ The comprehensive scope of this federal legislation will result in more precise liability standards for certain enumerated toxic waste disposal activities. Superfund will also limit the application of federal rules of decision to those relatively few aspects of hazardous waste control and disposal to which federal liability standards are uniquely suited.

In *City of Milwaukee v. Illinois*,⁷ the Supreme Court of the United States recently considered the impact of federal pollution statutes

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1 Recent examples of such tragedies include Love Canal, see M. BROWN, LAYING WASTE; THE POISONING OF AMERICA BY TOXIC CHEMICALS (1980). See generally Costle & Beck, *Attack on Hazardous Wastes: Turning Back The Toxic Tide*, 9 CAP. L. REV. 425 (1980); Note, *State Environmental Protection Legislation and The Commerce Clause*, 87 HARV. L. REV. 1762, 1762 (1974) ("Recently mounting concern with . . . the methods used to dispose of waste products has led to a proliferation of state and federal legislation designed to preserve the environment.").

2 See 16 WEEKLY COMP. OF PRES. DOC. 2797, 2797-2801 (Dec. 15, 1981).

3 See, e.g., CAL. HEALTH & SAFETY CODE §§ 25117-25611 (West Supp. 1981); New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23.1 to .33 (West Supp. 1981).

4 See text accompanying notes 23-33 *infra*.

5 Pub. L. No. 96-510, tit. III, §§ 1-308, 94 Stat. 2767 (to be codified at 46 U.S.C. §§ 9601-9657) (hereinafter Superfund).

6 See text accompanying notes 55-85 *infra*.

7 101 S. Ct. 1784 (1981).

upon the federal common law of nuisance. The Court noted that the earlier application of this federal common law of nuisance to issues of interstate water pollution was premised upon the absence of a federal statutory scheme governing this area.⁸ The Court held that the enactment of the Federal Water Pollution Control Act⁹ supplanted any previously available federal common law remedies.¹⁰ While this holding came in the context of an analysis of federal water pollution regulation, the Court's reasoning is equally applicable to all federal common law environmental remedies.¹¹

Federal common law has allowed federal courts to become involved in many areas of pollution control,¹² including hazardous waste disposal.¹³ This federal involvement, however, has sometimes been an intrusion into an area of uniquely state concern.¹⁴ A federal court applying a federal common law of nuisance is often ill-equipped to resolve issues arising in hazardous waste litigation. Because hazardous waste activities often have a direct impact upon land, liability may turn on such issues as fraud and other claims based upon the interpretation of instruments used to transfer real estate¹⁵ or a former landowner's liability for damages suffered by a

8 *Id.* at 1790-92. See *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); see generally Comment, *The Expansion of Federal Common Law and Federal Question Jurisdiction to Interstate Pollution*, 10 HOUS. L. REV. 590 (1977); Annot., 31 L. Ed.2d 1006 (1972) ("The Supreme Court and The Post-Erie Federal Common Law").

9 33 U.S.C. §§ 1251-1376 (1976) (hereinafter Clean Water Act).

10 101 S. Ct. at 1800. This holding, while somewhat surprising in light of the recognition of such a federal common law only nine years earlier, was not entirely unanticipated. See *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498-99 n.3 (1971); Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439 (1972).

11 See *Middlesex County v. National Sea Clammers*, 101 S. Ct. 2615 (1981); *Costle v. EPA*, No. 1595 (2d Cir. Aug. 24, 1981) (applying *City of Milwaukee v. Illinois* to Clean Air Act); *United States v. Price*, No. 80-4104 (D.N.J. Sept. 23, 1981) (hazardous waste disposal).

12 See notes 86 & 87 *infra*.

13 See, e.g., *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980).

14 Environmental quality is a traditional area of state concern. See *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. 715 (1981) (referring to the "substantial state interest in promoting conservation of . . . natural resources . . ."); *Agins v. City of Tiburon*, 447 U.S. 225 (1980) (upholding "open space" zoning); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 343 (1973) (pollution is historically within the police power of the state). In such areas, see *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960), the displacement of state law doctrines "is not lightly to be presumed." New York State Dept. of Social Servs. v. Dublino, 413 U.S. 405, 413 (1973). See also *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981) ("solid waste disposal . . . is a customary area of local concern long reserved to state and local governments by practice, tradition and legal precedent."). But see *SED, Inc. v. City of Dayton*, 519 F. Supp. 975, 978 (S.D. Ohio 1981) ("This Court questions whether hazardous waste problems are so parochial that they may properly be considered matters of State policy rather than of national concern.").

15 See *United States v. Hooker Chem. & Plastics Corp.*, No. 79-990 (W.D.N.Y. filed Dec.

subsequent landowner.¹⁶ These are precisely the types of questions that state, rather than federal, law is uniquely suited to resolve.¹⁷ After *City of Milwaukee v. Illinois*,¹⁸ Superfund ensures that such questions will be resolved under state law. Such a resolution affords states the opportunity and the responsibility to establish liability standards or schemes¹⁹ designed to protect the interests of all parties implicated in hazardous waste disposal activity.

The legislative evolution of Superfund confirms its comprehensive nature. As a broad federal response to the hazardous waste problem, Superfund supplants the largely undefined remedies²⁰

20, 1979). The key liability questions will undoubtedly turn upon language contained in a deed transferring certain Love Canal property:

Prior to the delivery of this instrument of conveyance, the grantee herein has been advised by the grantor that the premises above described have been filled, in whole or in part, to the present grade level thereof with waste products resulting from the manufacturing of chemicals by the grantor at its plant in the City of Niagara Falls, New York, and the grantee assumes all risk and liability incident to the use thereof. It is therefore understood and agreed that, as a part of the consideration for this conveyance and as a condition thereof, no claim, suit, action or demand of any nature whatsoever shall ever be made by the grantee, its successors or assigns, against the grantor, its successors or assigns, for injury to a persons or persons, including death resulting therefrom, or loss of or damage to property caused by, in connection with or by reason of the presence of said industrial wastes. It is further agreed as a condition hereof that each subsequent conveyance of the aforesaid lands shall be make subject to the foregoing provisions and conditions.

See also *State v. Ventron Corp.*, C-2996-75 (N.J. Super. Ct., Ch. Div. Aug. 27, 1979) (quoting the terms of a realty deed in support of a finding that a party's failure to disclose mercury contamination constituted fraud). Indeed, it has become quite clear that hazardous waste disposal activity will give rise to a large number of private damage claims. Many of these claims will turn upon the resolution of title conveyance and other issues which are traditionally associated with real estate rather than tort law.

16 See *United States v. Hooker Chem. & Plastics Corp.*, No. 79-990 (W.D.N.Y. filed Dec. 20, 1979); *United States v. Price*, No. 80-4104 (D.N.J. Sept. 23, 1981); *State v. Ole Olsen, Ltd.*, 38 A.D.2d 967, 331 N.Y.S.2d 761 (App. Div. 1972). See generally 58 AM. JUR.2d NUISANCES § 50 (1971).

17 See *Aberdeen v. Rockfish R.R.*, 409 U.S. 1207 (1972), in which the Supreme Court wrote:

Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted. The world must go on and new environmental legislation must be carefully meshed with traditional patterns of federal regulation.

409 U.S. at 1217-18.

18 101 S. Ct. 1784 (1981).

19 See, e.g., *Florida Wildlife Fed'n v. Department of Env't'l Reg.*, 390 So. 2d 64 (Fla. 1980) (private action to enjoin certain pollution activities established by state statute).

20 For an illustration of just how ill-defined the "environmental" rights and remedies of private parties in the area of the federal common law actually were, compare the district and appellate court opinions in *Reserve Mining Co. v. EPA*, 380 F. Supp. 11 (D. Minn. 1974), 514

available to civil claimants under the federal common law of nuisance.²¹ This pre-emption of federal common law will result in the use of "express" Superfund standards²² for situations which Congress directly addressed and will also result in the use of state common law remedies for those areas not covered by Superfund. The purpose of this article will be to examine the civil liability provisions of Superfund to determine the extent to which these provisions modify the role of the courts by pre-empting federal common law remedies and by fostering the application of those state common law principles.

II. Federal Legislative Efforts with Respect to Hazardous Wastes

Contrary to popular belief, federal involvement in environmental protection is longstanding.²³ In 1899, Congress passed the Refuse Act²⁴ to prevent obstruction and contamination of navigable waterways.²⁵ The Act made it unlawful to "discharge . . . from . . . [any] manufacturing establishment . . . any refuse matter of any kind or description . . . into any tributary of any navigable water of the United States . . . without a permit."²⁶ The statute provided crimi-

F.2d 492, modified, 529 F.2d 181 (8th Cir. 1975). See Note, *The Standard of Proof Required To Enjoin An Environmental Hazard To The Public Health*, 59 MINN. L. REV. 893 (1974).

21 It should be noted that Prosser has stated that "there is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'". W. PROSSER, *TORTS* 571 (4th ed. 1971). See generally Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Friendly, *In Praise of Erie—And of The New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Mishkin, *The Variousness of "Federal Law": Competence and Discretion In The Choice of National and State Rules For Decision*, 105 U. PA. L. REV. 797 (1957).

22 See text accompanying notes 116-24 *infra*.

23 See The Rivers and Harbors Act of 1890, Pub. L. No. 51-907, § 6, 26 Stat. 453.

24 Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1976).

25 The Act was a response to a Supreme Court decision holding that there was no federal common law preventing obstructions to navigable waterways. *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1 (1888). See Note, *The Refuse Act: Its Role Within The Scheme of Federal Water Quality Legislation*, 46 N.Y.U. L. REV. 304 (1971). While the language of the Act clearly covered all discharges into navigable waterways, Congress apparently was more concerned with dangers to navigation than with the conditions of the waterways themselves. See 21 Op. Att'y Gen. 305 (1896); see also Eames, *The Refuse Act of 1899, Its Scope and Role In Control of Water Pollution*, 1 ECOLOGY L.Q. 173 (1971). Judicial constructions of the Act, however, have imposed liability despite the absence of any navigational obstruction. See *United States v. Standard Oil Co.*, 384 U.S. 224 (1966); *United States v. Ballard Oil Co.*, 195 F.2d 369 (2d Cir. 1952); *United States v. Maplewood Poultry Co.*, 327 F. Supp. 686 (D. Me. 1971).

26 33 U.S.C. § 407 (1976). Refuse Act permits were originally to be issued by Secretary of the Army. In 1970, however, authority to issue permits under the Refuse Act was transferred to the Environmental Protection Agency (EPA). Exec. Order No. 11,574, 35 Fed. Reg. 19,627 (1970).

nal penalties of \$500 to \$2,500 per day and imprisonment for as much as one year.²⁷ While initial federal enforcement efforts under this statute were not vigorous,²⁸ extensive legislation was ultimately enacted to expand upon federal protection of environmental resources.²⁹

It was not until the 1965 passage of the Solid Waste Disposal Act,³⁰ however, that the federal government began its direct and comprehensive regulation of hazardous waste disposal. The Solid Waste Disposal Act provided federal assistance to local governments in the regulation of open dumpsites. In 1970, the Act was amended³¹ to provide for a comprehensive study of problems caused by hazardous wastes.³² This study's findings contributed to the 1976 enactment of the Resource Conservation and Recovery Act (RCRA),³³ which was designed to provide a regulatory framework for the disposal of almost all industrial wastes.

Under RCRA, permits were required for the treatment, storage or disposal of hazardous wastes.³⁴ RCRA created a "cradle to grave" system of controls for such wastes through the imposition of standards for generators, transporters, treaters, and disposers.³⁵ These requirements were designed to ensure the safe handling of hazardous

27 33 U.S.C. § 407 (1976). It is interesting to note that this statute sought to address an environmental problem by providing exclusively criminal penalties. *But see* *United States v. Wyandotte Transp. Co.*, 389 U.S. 191, 204 (1967) (injunctive actions permitted under the Refuse Act). For a fascinating discussion of the propriety of utilizing criminal penalties in the environmental protection area, *see* *United States v. Frezzo Bros.*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), *remanded on other grounds*, 642 F.2d 59 (3d Cir. 1981). *See also* Glenn, *The Crime of Pollution: The Role of Federal Water Pollution Criminal Sanctions*, 11 AM. CRIM. L. REV. 835 (1973).

28 *See* R. DRULEY, *THE REFUSE ACT OF 1899* (BNA Monograph No. 11, 1972). Because of enforcement problems presented by subsequent water pollution control legislation, however, this statute became an essential federal enforcement tool. *See* G.A.O., *CONTROLLING INDUSTRIAL WATER POLLUTION—PROGRESS AND PROBLEMS* (1970).

29 *See, e.g.*, National Environmental Policy Act, 42 U.S.C. §§ 4322-4374 (1976); Clean Air Act, 42 U.S.C. §§ 7401-7602 (Supp. 1978); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976) (Clean Water Act).

30 Solid Waste Disposal Act, Pub. L. No. 89-272, tit. II, 79 Stat. 997 (1965), *as amended by* Pub. L. No. 94-580, § 2, 90 Stat. 2795 (1976) (codified at 42 U.S.C. §§ 6901-6987 (1976)).

31 Pub. L. No. 91-512, tit. I, §§ 101-105, 84 Stat. 1227 (1970).

32 *Id.* § 104(b) (codified at 42 U.S.C. § 6981 (1976)).

33 Resource Conservation and Recovery Act, Pub. L. No. 94-580, §§ 1001-8007, 90 Stat. 2795 (1976) [hereinafter referred to as RCRA §§ 1001-8007] (codified at 42 U.S.C. §§ 6901-6987 (1976)).

34 42 U.S.C. § 6925 (1976) (RCRA § 3005).

35 42 U.S.C. §§ 6921-6925 (1976) (RCRA §§ 3002-3005). These standards included the imposition of a manifest system tracking hazardous wastes from generation through disposal, *id.* *See* 40 C.F.R. §§ 262-267 (1981). A comprehensive private post-disposal monitoring system was left to a later day.

wastes from generation to disposal. Civil and criminal penalties were provided for non-compliance.³⁶

While RCRA provided an extensive regulatory scheme for hazardous waste disposition, several significant monitoring and enforcement "gaps" existed. The most striking of these gaps concerned the disclosure of, response to, and compensation for events which occurred prior to the RCRA's enactment. RCRA imposed permit and operating requirements upon parties engaged in the generation, transportation, storage or disposal of hazardous wastes.³⁷ These parties were required to notify the EPA with respect to their present activities.³⁸ As originally enacted, however, RCRA contained no disposal site inventory or monitoring requirement. Such requirements were not included under RCRA until October, 1980.³⁹

Moreover, even these belated inventory and monitoring provisions were not directly applicable to private parties. RCRA did not impose the obligation to prepare an inventory of hazardous waste storage and disposal sites upon private parties, but rather upon the states in which those sites were located.⁴⁰ While federal funds were provided to assist the states in carrying out their inventory programs,⁴¹ no incentives for private party disclosure were provided. Indeed, RCRA provided a disincentive for former hazardous waste site owners or operators to notify state authorities. Under RCRA's multistep monitoring provision,⁴² if the Environmental Protection Agency (EPA) determined that a "substantial hazard to human health or the environment"⁴³ was present at any present or *former* hazardous waste site, an order requiring "monitoring, testing, analysis and reporting" at such site could be issued.⁴⁴ Such an order could require monitoring not only by present owners and operators, but by certain previous owners and operators as well.⁴⁵ Because RCRA im-

36 42 U.S.C. § 6928 (1976) (RCRA § 3008).

37 42 U.S.C. §§ 6922-6925 (1976) (RCRA §§ 3002-3005); 40 C.F.R. §§ 260-267 (1981); see 45 Fed. Reg. 33,066 (1980); 45 Fed. Reg. 12,724 (1980).

38 42 U.S.C. § 6930 (1976) (RCRA § 3010). "Small generators" were excepted, but all others were required to file a "Preliminary Notification of Hazardous Waste Activity" by August 19, 1980. 45 Fed. Reg. 12,746 (1980).

39 Pub. L. No. 96-482, § 17(a), 94 Stat. 2342 (1980) (RCRA §§ 3012 & 3013) (to be codified at 42 U.S.C. §§ 6933, 6944).

40 RCRA § 3012(a).

41 *Id.* § 3012(c).

42 *Id.* § 3013.

43 *Id.* § 3013(a)(2).

44 *Id.*

45 The statute is not clear concerning whether such orders also apply to sites which came into existence before the enactment of RCRA. See RCRA § 3013(b); see also note 48 *infra*.

posed both direct monitoring costs and civil penalties for non-compliance with monitoring orders,⁴⁶ former owners and operators were reluctant to disclose the existence of these former hazardous waste disposal sites to the states or the EPA.

RCRA's entire enforcement scheme was keyed to specific administrative regulations.⁴⁷ As the EPA itself recognized, these regulations were "organized in a way which seems to contemplate coverage only of those facilities which continue to operate after the effective date of the regulations."⁴⁸ Many of the most serious environmental problems posed by hazardous waste disposal, however, are presented in circumstances where on-going activity⁴⁹ is simply not involved.⁵⁰ While certain RCRA jurisdictional provisions were arguably appli-

46 RCRA § 3013(e).

47 42 U.S.C. §§ 6922-6925 (1976) (RCRA §§ 3002-3005).

48 45 Fed. Reg. 33,068 (1980) (EPA does not intend to regulate facilities closed before statute). See *Freeman v. Olin*, No. 80-M-5057 (N.D. Ala. Aug. 14, 1981). But see *United States v. Price*, No. 80-4104 (D.N.J. Sept. 23, 1981) ("The gravamen of a [RCRA] Section 7003 action . . . is not defendants' dumping practices which . . . ceased . . . in 1972, but the present imminent hazard posed by the continuing disposal (i.e. leaking) of contaminants into the groundwater").

49 The applicability of RCRA to activity engaged in prior to the enactment of the statute is, of course, not the only timing problem presented. Perhaps even more immediately significant is the level of compliance required for hazardous waste storage or disposal facilities which have been accorded "interim status" under the statute. In enacting RCRA, Congress recognized that the EPA would not be capable of issuing all of the necessary RCRA permits in a timely fashion. To meet this problem, Congress provided that "any person who . . . operates a facility required to have a [RCRA] permit . . . [who] has made an application for [such] a permit [on or before] . . . shall be treated as having been issued such permit until such time as final administrative disposition of such application is made . . ." 42 U.S.C. § 6925(e) (1976) (RCRA § 3005). EPA has recognized that RCRA grants automatic interim status to operators of waste storage facilities and that certain "commentators" believe that RCRA does not "[authorize] EPA to impose facility requirements during the interim status period." 45 Fed. Reg. 33,158 (1980). The EPA, however, issued interim standards for the continued operation of waste storage facilities. 45 Fed. Reg. 33,254-58 (1980).

The possible penalty for failure to meet these interim requirements is not clear. 42 U.S.C. § 6928 (1976) sets forth RCRA's federal enforcement provision. As originally enacted, this section provided for compliance orders and possible civil and criminal penalties of \$25,000 per day and imprisonment for one year. The section, however, did not contain any explicit authorization of EPA's interim standards; nor did it contain a formula for assessing civil or criminal penalties for alleged violations of these standards.

Late in 1980, however, Congress amended RCRA to provide for criminal penalties for any party who failed to comply with these interim standards and thereby knowingly placed another person in imminent danger of death or serious bodily injury. Pub. L. No. 96-482, § 13, 94 Stat. 2339 (1980) (to be codified at 42 U.S.C. § 6928(e)(1)(B)). These criminal penalties could involve a fine of as much as \$250,000 and imprisonment for as long as five years. Civil penalties of \$25,000 per day were also provided for such life threatening violations of EPA interim standards. *Id.*

50 See, e.g., *United States v. Price*, No. 80-4104 (D.N.J. Sept. 3, 1981); *United States v. Hooker Chem. & Plastics Corp.*, No. 79-990 (W.D.N.Y. filed Dec. 20, 1979); *State v. Ole*

cable in such circumstances,⁵¹ its permit and notification requirements were not⁵² and discovery of the source of environmental problems remained just as difficult as it had been prior to RCRA's enactment.⁵³ In part to remedy this problem, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund)⁵⁴ was enacted.

III. Superfund

As originally proposed, Superfund was a multi-faceted federal regulatory scheme designed to provide an independent basis for environmental claims by both government and private parties.⁵⁵ Many

Olsen, Ltd., 38 A.D.2d 967, 331 N.Y.S.2d 761 (App. Div. 1972); *Lamb v. Roberts*, 196 Ala. 679, 72 So. 309 (1916).

51 Section 7003 of RCRA provides:

Notwithstanding any other provisions of this Act, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste is presenting an imminent and substantial endangerment to health or environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to the alleged disposal to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected state of any such suit.

42 U.S.C. § 6973 (Supp. 1978). This section, however, has been interpreted as conveying jurisdiction upon the federal courts in instances where an imminent hazard is presented, as opposed to providing substantive hazardous waste liability standards. *See Freeman v. Olin*, No. 80-M-5057 (N.D. Ala. Aug. 14, 1981); *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980); *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138, 144 (N.D. Ind. 1980).

52 *See* note 48 *supra*.

53 Some courts have found RCRA § 7003 to be substantive rather than jurisdictional, and have purported to determine hazardous waste liability questions in accordance with the "standards" imposed by this section. *See United States v. Price*, No. 80-4104 (D.N.J. Sept. 23, 1981); *United States v. Diamond Shamrock Corp.*, No. C80-1857 (N.D. Ohio May 29, 1981). This view is not supported by the legislative history of RCRA. *See* [1976] U.S. CODE CONG. & AD. NEWS 6308. Section 7003 is found in "Miscellaneous Provisions" of RCRA's subchapter VII, which do not otherwise establish any substantive rights or liabilities. It is doubtful that § 7003 was designed to do any more than provide access to the federal courts in certain "emergency" situations. *See* note 51 *supra*.

54 *See* note 5 *supra*.

55 *See* 125 CONG. REC. S9173-9180 (daily ed. July 11, 1979). Early drafts of Superfund contained explicit provisions that:

notwithstanding the ordinary requirements for proof of cause in fact or the proximate cause of damage, injury or loss, a person liable under this section for any discharge, release or disposal of any hazardous substance, shall be liable for all medical expenses [incurred by a claimant] . . . if a reasonable person could conclude that such medical expenses and the injury or disease which caused them are reasonably related to such discharge, release or disposal, including but not limited to the consideration of statistical correlation and the increase of incidents of such injury or

controversial elements of Superfund were eliminated⁵⁶ in the effort to pass a comprehensive regulatory scheme for hazardous waste management before the Reagan administration took office.⁵⁷ Even in its modified form, however, Superfund is a drastic change from the previous regulatory scheme.

Superfund contains both a revenue⁵⁸ and a regulatory⁵⁹ aspect. Under its revenue aspect, excise taxes are imposed upon generators of chemical and petroleum products⁶⁰ and upon hazardous waste disposal sites.⁶¹ The tax upon generators is to be added to other governmental revenues⁶² to fund a Hazardous Substances Response Fund. This fund will be used to pay governmental response costs⁶³ in the clean up of hazardous substance deposits and spills. The disposal site tax will be used to establish a Post Closure Fund to finance the monitoring and closure of hazardous waste disposal sites which received RCRA operating permits.⁶⁴

Superfund's regulatory aspect fills many of the RCRA's gaps by requiring extensive reporting and recordkeeping for both present and former hazardous waste disposal sites.⁶⁵ Hazardous waste disposal sites which did not apply for RCRA permits must be reported.⁶⁶

disease in the exposed population above that which is otherwise statistically probable.

Id. at S9176.

56 These included, for example, the epidemiological provisions cited in note 55 *supra*; an explicit provision that liability was to be "strict, joint and several;" a reduction of the size of the Superfund "fund" from \$4.1 billion over six years to \$1.6 billion over five years, *see* 11 ENVIR. REP. (BNA) 1097 (1980); and the addition of "causation" defenses for hazardous waste generators.

57 *See* Note, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L.J. 1047, 1057 n.61 (1981); 38 CONG. Q. WEEKLY REP. 3435 (Nov. 28, 1980). The last minute compromises which were made in order to assure passage of Superfund resulted in an almost total absence of meaningful legislative history on key liability questions. While much congressional discussion can be found on liability issues, this discussion often relates to early drafts of the statute, rather than the language contained in Superfund, as enacted. *See* note 121 *infra*.

58 Superfund, *supra* note 5, §§ 201-232.

59 *Id.* §§ 101-115.

60 *Id.* § 211. These excise taxes are imposed at a rate of \$.79 per barrel of crude oil and from \$.22 to \$4.87 per ton of certain industrial chemicals.

61 *Id.* § 231. This tax is imposed at the rate of \$2.13 per dry weight ton of hazardous waste.

62 Seven-eighths of the fund is financed through taxes, and one-eighth through appropriations.

63 *Id.* § 221(c).

64 *Id.* § 232. *See id.* §§ 107(k)(1)(B) & 111(j).

65 *Id.* § 103.

66 *Id.* § 103(c). Certain "de minimis" exceptions have been made to this reporting requirement. *See* 46 Fed. Reg. 22,144 (1981).

Such disclosure has to include the existence of the site, the amount and type of hazardous wastes disposed there, and the likelihood of escape of those substances.⁶⁷ Significantly, this reporting requirement is imposed upon both present and former owners of such sites,⁶⁸ thereby fostering disclosure of inactive or unknown sites.⁶⁹

Site notification, however, is not Superfund's only disclosure requirement. Any party in charge of a facility at which a release of a reportable quantity⁷⁰ of hazardous substances occurred is required to notify the EPA. Release⁷¹ is broadly defined to include almost all "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" ⁷² Similarly, "hazardous substance" is defined to include all of the thousands of substances listed or designated as hazardous under the Clean Water Act, the Clean Air Act, RCRA and the Toxic Substances Control Act.⁷³ Criminal liability is provided for failure to meet these notification requirements.⁷⁴

The disclosure requirements in turn facilitate the governmental

67 Superfund, *supra* note 5, § 103(c). The EPA has issued a proposed form for use in meeting this reporting requirement. 46 Fed. Reg. 22,155-56 (1981).

68 Superfund, *supra* note 5, § 103(e). It should be noted that this reporting requirement applied only to wastes listed as hazardous under RCRA and not to all wastes which could be listed as hazardous under the terms of Superfund itself. *See* note 73 *infra*.

69 *See* 46 Fed. Reg. 22,144, 22,147 (1981) (noting that the disclosure requirements of § 103(c) were designed in part to "alert the Agency to . . . on-site [disposal] activities"). The provisions of § 103(c) are not, of course, the first federal effort to identify hazardous waste disposal sites. In 1969, for example, the U.S. House Committee on Interstate and Foreign Commerce surveyed large chemical companies for information on hazardous waste disposal sites. 46 Fed. Reg. 22,147 (1981).

70 Superfund, *supra* note 5, § 102. As to those substances for which "reportable quantities" were established under § 311 of the Clean Water Act, Superfund set forth a "one pound" standard. *Id.* § 102(b). This standard, however, is largely illusory, because the statute does not indicate whether "one pound" means "one pound per discharge," "one pound per day," or a "total of one pound." Since § 311 of the Clean Water Act permits certain discharges of up to 5000 pounds per day, 40 C.F.R. § 117.3 (1981), it is unlikely that Superfund's poundage limitation is based on a one day period.

On May 28, 1981, the EPA issued a draft of a notification requirement which did raise certain notification levels. 12 ENVIR. REP. (BNA) 360 (1981). The reportable quantities vary from one to one hundred pounds depending upon the type of chemical. *Id.*

71 *Id.* § 101(22).

72 Environment is defined to include "navigable waters . . . and . . . surface water, groundwater, drinking water supply, land surface or subsurface strata, or ambient air . . . under the jurisdiction of the United States." *Id.* § 101(8). The EPA has issued a draft rule/policy statement which modifies these broad notification requirements with respect to incidental spillage and other releases which clearly do not "demand immediate response." *See* Inside EPA Weekly Report, Vol. 2, No. 13 (Mar. 27, 1981), at 1, 7-8.

73 Superfund, *supra* note 5, § 101(14).

74 *Id.* §§ 103(b), (c).

response mechanism established by the statute. Under Superfund, the President is required to establish a National Contingency Plan⁷⁵ which sets forth procedures and standards for response to releases of hazardous substances.⁷⁶ This plan is to establish procedures for discovering hazardous waste locations and for evaluating removal costs and methods.⁷⁷ Parties associated with the generation or management of hazardous substances are required to furnish information to the EPA with respect to these substances and to permit on-site inspections and sampling.⁷⁸

Under the statute, the President is empowered to exercise "response authority" to actual or threatened releases of hazardous substances.⁷⁹ This statutory response authority permits the President to take whatever remedial steps are "necessary to protect the public health or welfare or the environment."⁸⁰ In addition, when the President determines that there may be an imminent and substantial danger to the public health or welfare or to the environment, he may order the attorney general to seek legal or equitable relief or, after notice to the state, issue all necessary remedial protective orders.⁸¹

With respect to releases of hazardous substances,⁸² responsible parties⁸³ are liable for: (1) governmental response costs; (2) private

75 The EPA has not yet established such a plan, but has promised to send a proposed National Contingency Plan to Congress by April, 1982. 12 ENVIR. REP. (BNA) 544 (1981). The delays in publication are apparently the result of the difficulties in formulating cleanup procedures on a case by case basis. *Id.* at 681.

The Environmental Defense Fund has filed suit in the United States District Court for the District of Columbia to compel the EPA to publish the proposed plan by February 1, 1982. *Id.* at 544.

The present delay in promulgating the plan has resulted in the odd situation of plaintiffs instituting suits under Superfund and claiming that their demands are consistent with a National Contingency Plan not in existence. See Complaint, par. 53, *City of Philadelphia v. Stepan*, No. 81-0851 (E.D. Pa. filed Mar. 9, 1981).

76 Superfund, *supra* note 5, § 105.

77 *Id.* The plan also will establish a system of state and federal cooperation, and will analyze cost effectiveness, and will determine priorities for responses to threatened releases. *Id.*

78 *Id.* § 104(e).

79 *Id.* § 104. The President has delegated this emergency power to a variety of federal agencies ranging from the EPA to the Coast Guard. Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981).

80 Superfund, *supra* note 5, § 104(a)(1).

81 *Id.* § 106(a).

82 See note 73 *supra*.

83 Superfund, *supra* note 5, § 107(a). Responsible parties are defined to include: (1) present and certain former owners or operators of the facility from which the hazardous substance was released; (2) transporters of the released substance; and (3) those who arranged for transport or disposal of the released substance (usually generators). See *id.* § 101(32).

response costs consistent with the National Contingency Plan; and (3) damages for injury to natural resources.⁸⁴ Liability is imposed unless the responsible party can demonstrate that the extremely limited affirmative defenses available under the statute should apply.⁸⁵

IV. Post-Superfund Liability for Hazardous Waste Disposal Activity

Prior to Superfund, numerous actions were instituted in federal courts seeking compensation for injuries allegedly suffered as a result of hazardous waste disposal activities. These actions were based upon numerous legal theories.⁸⁶ Often included among these theories was the federal common law of nuisance.⁸⁷

In 1972 in *Illinois v. City of Milwaukee*,⁸⁸ the Supreme Court explicitly recognized a federal common law of nuisance with respect to interstate water pollution. This federal common law was meant to provide "each state the right to be free from unreasonable interference with its natural environment and resources when the interference stems from another state or its citizens."⁸⁹ Federal courts applied this doctrine not only to air⁹⁰ and water⁹¹ pollution but also

84 *Id.* § 107(a).

85 *Id.* § 107(b). Liability is not imposed for releases caused solely by: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party if the third party is not an agent or employee of the defendant and if the defendant can establish that he exercised due care with respect to the hazardous substance involved and took precautions against the foreseeable acts and omissions of the third party. *Id.* Comparable liability defenses are provided under the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1321(f)(1) (1976).

86 *See, e.g.*, *United States v. Hamel*, 551 F.2d 107 (6th Cir. 1977) (Refuse Act of 1899); *United States v. Duracell, Inc.*, 510 F. Supp. 154 (M.D. Tenn. 1981) (Clean Water Act); *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980) (RCRA and Clean Water Act); *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980) (RCRA); *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138 (N.D. Ind. 1980) (RCRA); *United States v. Union Corp.*, No. 80-1589 (E.D. Pa. Apr. 23, 1980) (Toxic Substance Control Act); *United States v. Hooker Chem. & Plastics Corp.*, No. 79-990 (W.D.N.Y., filed Dec. 20, 1979) (Clean Water Act and Safe Drinking Water Act). *See generally* R. MOTT, *HAZARDOUS WASTE LITIGATION* (1981).

87 *See, e.g.*, *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980); *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138 (N.D. Ind. 1980); *United States v. Petrol Processors, Inc.*, No. 80-358-B (M.D. La. July 15, 1980); *United States v. Hooker Chem. & Plastics Corp.*, No. 79-990 (W.D.N.Y. filed Dec. 20, 1979).

88 406 U.S. 91 (1972).

89 *City of Milwaukee v. Illinois*, 101 S. Ct. 1784, 1801 (1981) (Blackmun, J., dissenting). *See Stream Pollution Control Bd. v. United States Steel Corp.*, 512 F.2d 1036 (7th Cir. 1975); *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980).

90 *See Washington v. General Motors Corp.*, 406 U.S. 109 (1972) (plaintiffs allowed to renew public nuisance allegation in district court); *Board of Supervisors v. United States*, 408 F. Supp. 556 (E.D. Va. 1976), *appeal dismissed*, 551 F.2d 305 (4th Cir. 1977). *But see Virginians*

to problems of hazardous waste disposal.⁹²

The federal common law of nuisance is a relatively recent judicial creation and has not been well defined.⁹³ Questions concerning the standing of private parties to base actions upon such federal common law⁹⁴ and the applicability of this doctrine to purely intrastate activity⁹⁵ were the subject of dispute in the federal courts. It was clear, however, that federal courts would not hesitate to use this tool in their attempts to solve the environmental problems caused by hazardous waste disposal activity. The courts spoke of the "strong federal interest in preventing and abating incidents of ground water pollution caused by the disposal of hazardous waste"⁹⁶ and the "overriding federal interest in the need for a uniform rule of decision . . ."⁹⁷ in this area.

In a single stroke, however, Superfund eliminated the application of the federal common law of nuisance to hazardous waste activity. Federal courts are now limited to determining questions of statutory liability and to applying state, rather than federal, rules of decision with respect to private liability questions.⁹⁸

for *Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Va. 1972), *modified*, 541 F.2d 442 (4th Cir. 1976) (federal statutes pre-empted federal common law of nuisance for aircraft emissions).

91 See *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Illinois v. Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980), *cert. granted, vacated and remanded*, 101 S. Ct. 3152 (1981); *Ancarrow v. City of Richmond*, 600 F.2d 443 (4th Cir.), *cert. denied*, 442 U.S. 992 (1979). See also Note, *Federal Common Law Remedies for the Abatement of Water Pollution*, 5 FORD. URB. L.J. 546 (1977).

92 *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980). See Annot., 29 A.L.R. FED. 137 (1976).

93 Recognizing the existence of a federal common law of nuisance does not, of course, define the parameters of such a doctrine. See *Massachusetts v. United States Veterans Admin.*, 541 F.2d 119, 122-23 (1st Cir. 1976). Some courts would have based the doctrine upon the Restatement of Torts, see *id.*; *United States v. Ira. S. Bushey & Sons*, 363 F. Supp. 110 (D. Vt. 1973); PLI, HAZARDOUS WASTE LITIGATION 51 (R. Mott, chairman 1981). See also *In re Oswego Barge Corp.*, 439 F. Supp. 312, 322 n.9 (N.D.N.Y. 1977).

94 See *Middlesex County v. National Sea Clammers*, 101 S. Ct. 2514 (1981) (declining to decide the issue of private party standing). Compare *Committee for Consideration of Jones Falls Sewage System v. Train*, 375 F. Supp. 1148 (D. Md. 1974), *aff'd*, 539 F.2d 1006 (4th Cir. 1976) with *Byram River v. Port Chester*, 394 F. Supp. 618 (D. Conn. 1974). See generally Prosser, *Private Action for Public Nuisance*, 53 VA. L. REV. 997 (1966).

95 Compare *Illinois v. Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980), *cert. granted, vacated and remanded*, 101 S. Ct. 3152 (1981) with *Ancarrow v. City of Richmond*, 600 F.2d 443, 445 (4th Cir.), *cert. denied*, 442 U.S. 991 (1979).

96 *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127, 1138 (D. Conn. 1980).

97 *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972).

98 Of course, federal common law may not have differed substantially from state law concerning private liability. See *United States v. Solvents Recovery Serv.*, 446 F. Supp. 1127, 1142 (D. Conn. 1980). For example, in *In re Oswego Barge Corp.*, 439 F. Supp. 312, 322 (D.

In *City of Milwaukee v. Illinois*,⁹⁹ the Supreme Court considered for the first time the impact of federal environmental legislation upon the power of federal courts to fashion federal common law remedies. In a 6-3 opinion, the Court ruled that Milwaukee's liability for emitting raw sewage into Lake Michigan was to be governed exclusively by the standards established under the federal Clean Water Act and not by any federal common law nuisance theory.¹⁰⁰ The Court reasoned that "as soon as Congress 'addresses a question previously governed' by federal common law, the need for such [a body of law] disappears."¹⁰¹ In determining whether Congress had "occupied the field through the establishment of a comprehensive regulatory program," the Court would "start with the assumption that it is for Congress not the federal courts to articulate the appropriate standards to be applied as a matter of federal law."¹⁰² In reaching its decision, the majority emphasized that "Congress' intent . . . was clearly to establish an all-encompassing program of water pollution regulation."¹⁰³

The applicability of *City of Milwaukee v. Illinois*¹⁰⁴ to Superfund's regulation of hazardous wastes is manifest. The Act's title, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, indicates its comprehensive scope. As originally proposed, Superfund would have involved an even broader federal involvement in hazardous waste regulation.¹⁰⁵ Congress' rejection of this broader role, however, does not diminish the comprehensive nature of this effort to fill the gaps in federal supervision of hazardous waste disposal activity.¹⁰⁶

Conn. 1977), the court found no substantial differences between federal common law and New York common law of nuisance.

In view of the possible conflict between a nationally consistent federal common law and important state interests, however, there is no assurance that the state liability standards will be the same as those of a federal common law. See Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 682 n.122 (1959); see also notes 153 & 154 *infra*.

99 101 S. Ct. 1784 (1981).

100 *Id.* at 1792.

101 *Id.* at 1791.

102 *Id.* at 1792. The majority pointed out that this analysis was different from the one used to determine whether federal statutes pre-empted state regulation. *Id.*

103 *Id.* at 1792. Indeed, the Court felt that this congressional intent was strong enough to overcome an explicit statutory provision that the authorized citizen suits were not to supplant common law remedies.

104 101 S. Ct. 1784 (1981).

105 See note 56 *supra*.

106 See note 2 *supra*. See also R. ZENER, GUIDE TO FEDERAL ENVIRONMENTAL LAW 197 (P.L.I. 1981) ("Government enforcement officials have encountered several major obstacles in their efforts to clean up abandoned disposal sites. . . . For these and other reasons, Congress

Superfund has an extensive civil liability provision.¹⁰⁷ Present and former owners and operators of waste facilities, transporters, and generators may be liable for:

[A]ll costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

[A]ny other necessary costs of response incurred by any other person consistent with the national contingency plan; and

Damages for injury to natural resources.¹⁰⁸

Conspicuous by their absence, however, are any provisions for the recovery of consequential, personal injury or other damages by private claimants.¹⁰⁹ Similarly absent is any provision for recovery of damages to natural resources occurring prior to Superfund's enactment.¹¹⁰ While all liability claims under the Act are to be determined in federal court without regard to the citizenship of the parties or the amounts in controversy,¹¹¹ many potentially significant liability claims simply are not addressed by Superfund.

After Superfund, it is uncertain how statutory liability issues are to be resolved, and what standards are to be applied to private liability claims not addressed by the statute.

While not the epitome of clarity, Superfund was not completely silent on these questions. Section 101(32)¹¹² provides that the liabil-

enacted a comprehensive legislative approach to the problem of abandoned disposal sites in late 1980.").

107 Superfund, *supra* note 5, § 107. The liability provisions of Superfund are rather harsh and may include punitive damages up to three times the removal costs. *Id.* § 107(c)(3). Damage limitation amounts are also very high. *Id.*

108 *Id.* § 107(a). In addition, the President may, when he "determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility," require the attorney general to bring a suit for abatement. *Id.* § 106. The district court is authorized to "grant such relief as the public interest and the equities of the case may require." *Id.* § 106(a). The President is given broad authority to issue "such orders as may be necessary to protect public health and welfare and the environment." *Id.* Willful violation of such an order may result in a fine of \$5,000 for each day of violation, *id.* § 106(b), or treble damages, *id.* § 107(c)(3).

Substantial questions remain to be answered concerning the relationship of the § 106 imminent endangerment action and a § 107 liability claim. Thus, while defendants may only avail themselves of very limited defenses in § 107 actions, *see* note 85 *supra*, § 106 seems to indicate that defendants may have traditional equitable defenses such as estoppel or laches available to them in a § 106 proceeding.

109 Except, of course, to the extent that such damages can be recovered by private parties as response costs consistent with the National Contingency Plan. *See* note 84 *supra*.

110 *See* Superfund, *supra* note 5, § 111(d)(1).

111 *Id.* § 113(b).

112 *Id.* § 101(32). *See* text accompanying notes 116-24 *infra*.

ity standard under the Act is the same as that imposed under section 311 of the Clean Water Act.¹¹³ Superfund also provides that "nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances. . . ." ¹¹⁴ Furthermore, Congress indicated that nothing in Superfund shall be construed or interpreted as pre-empting any state from imposing any additional liability or requirements with respect to the release of hazardous substances within such state.¹¹⁵

In view of these legislative pronouncements, the problem for the courts lies in determining how these statutory pre-emption and standard of liability declarations are to be applied to the numerous potential liability situations which arise in the area of hazardous waste disposal activity.

V. Direct Superfund Liability

In situations directly addressed by Superfund, liability is to be determined by the standards of section 311 of the Clean Water Act.¹¹⁶ This section has been held to impose strict liability.¹¹⁷ Superfund's reference to the Clean Water Act's liability standard, however, may raise more questions than it answers.

Courts interpreting section 311 have carefully examined the Clean Water Act's legislative history.¹¹⁸ In each case, the courts have found that Congress intended to impose strict liability. These findings, however, came in the context of determining the liability of parties intimately involved in the challenged pollution activity, and thus, congressional intent was relatively clear.¹¹⁹

113 33 U.S.C. § 1321 (1976). See text accompanying notes 116-19 *infra*.

114 Superfund, *supra* note 5, § 302(d). See text accompanying notes 129-31 *infra*.

115 *Id.* § 114(a).

116 See note 113 *supra*.

117 See *United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 3031 (1981); *Stuart Transp. Co. v. United States*, 596 F.2d 609 (4th Cir. 1979); *Burgess v. M/V Tamano*, 564 F.2d 964 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978). *But see Hollywood Marine, Inc. v. United States*, 101 S. Ct. 2336 (1981) (Rehnquist, J., dissenting).

118 See note 117 *supra*.

119 At issue in both *LeBeouf* and *Burgess*, *supra* note 117, was the scope of § 311's third party defense. The *LeBeouf* court held that a tugboat crew was not such a third party as to relieve the owner-operator from liability. 621 F.2d at 788. In *Burgess*, the court held that a supertanker's temporary local pilot was not a third party under § 311. 564 F.2d at 982. Both courts emphasized that the available defenses had to be narrowly construed in order to effectuate congressional intent. 621 F.2d at 789. *But see Hollywood Marine, Inc. v. United States*, 101 S. Ct. 2336 (1981) (Rehnquist, J., dissenting) (no reason to construe § 311 narrowly).

Superfund, on the other hand, imposes liability upon many parties whose connection with the injuries involved may be much less obvious.¹²⁰ In such cases, the courts will have to examine Superfund's legislative history to determine if the strict liability standard should be applied.¹²¹ In view of the numerous potential liability situations which can arise in hazardous waste disposal activity, it is impossible to determine just what this evaluation of legislative intent will disclose in any particular case.

It is clear, however, that Superfund's strict liability standards should be confined to those parties who engaged in substantial and purposeful hazardous waste disposal activity for commercial profit after the enactment of this statute. Automatic application of strict liability to parties whose conduct was substantially unrelated to the present danger posed by the hazardous waste release¹²² or who did not obtain commercial benefit from their conduct,¹²³ does not appear to be compelled by the environmental concerns which gave rise to Superfund.¹²⁴

120 An example of such a party would be a municipality which foreclosed upon a hazardous waste disposal site for tax deficiencies. The municipality would thus become liable as a present or former owner of the site. Where the relationship between former activity and present injury is tenuous, as in the case of a generator, automatic imposition of strict liability may be uncalled for.

121 As indicated above, Superfund's legislative history is not particularly clear. See note 57 *supra*. Some proponents of Superfund argued that § 101(32) would impose the strict liability standard. See 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph); 126 CONG. REC. H11,787 (daily ed. Dec. 3, 1980) (remarks of Rep. Florio).

An express provision imposing strict liability for hazardous substance spills was eliminated from the final version of Superfund. See 38 CONG. Q. WEEKLY REP. 3435 (Nov. 28, 1980); Note, *Liability for Generators of Hazardous Wastes: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L.J. 1047, 1056-58 (1981).

Section 302(d) of Superfund provides that the statute "shall not be . . . interpreted . . . as reflecting a determination . . . of policy regarding the inapplicability of strict liability." Superfund, *supra* note 5, § 302(d). See 126 CONG. REC. H11,790 (daily ed. Dec. 3, 1980) (remarks of Rep. Broyhill). Thus, there is a substantial question concerning the automatic application of strict liability.

122 See *United States v. Price*, No. 80-4104 (D.N.J. Sept. 23, 1981) (defendants bought property several years after dumping had ceased).

123 See, e.g., *United States v. Hooker Chem. & Plastics Corp.*, No. 79-990 (W.D.N.Y. filed Dec. 20, 1979) (Love Canal municipal defendants).

124 The elimination of language imposing strict liability to all Superfund claims was a part of a compromise designed to accommodate concerns for a safe and clean environment with a desire to limit the costs of obtaining these environmental goals. Thus, § 104(c)(4) requires a cost/benefit analysis for certain Superfund expenditures. Superfund, *supra* note 5, § 104(c)(4). Responsible parties are also exonerated from liability for damage to natural resources prior to Superfund. *Id.* § 107(f).

Imposing strict liability upon parties who have not engaged in substantial and purposeful hazardous waste activity is not compelled by express statutory terms. Moreover, such

The strict liability standard, however, will no doubt be applied in some instances. Thus, parties whose involvement with hazardous waste disposal activity ended long before Superfund may be held to a retroactive strict liability standard while at the same time they are deprived of traditional defenses applicable under such a standard.¹²⁵ Even without considering the questionable policy considerations inherent in such a use of strict liability,¹²⁶ there can be little doubt that such an application of Superfund "create[s]" a new obligation, . . . [and] . . . attaches a new disability, in respect to transactions . . . already past."¹²⁷ Such retroactive application of a federal civil statute would violate the due process provisions of the fifth amendment because it would inflict a "manifest injustice" upon certain affected

imposition is not consistent with the congressional goals evidenced by the compromise nature of Superfund. See note 121 *supra*.

Strict liability is not the only question raised by the ambiguous § 101(32). Joint and several liability issues will have to be resolved on a case-by-case basis. To resolve these issues both the status and conduct of the particular defendants will have to be examined and the legislative histories of both the Clean Water Act and Superfund will have to be consulted. Compare 126 CONG. REC. H11,788-89 (daily ed. Dec. 2, 1980) with 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) and 126 CONG. REC. S14,003 (daily ed. Nov. 24, 1980).

125 See note 85 *supra*.

126 See *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W.2d 221 (1936); Note, *Strict Liability for Generators, Transporters and Disporters of Hazardous Wastes*, 64 MINN. L. REV. 949, 970 (1980); Note, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L.J. 1047, 1065 n.104 (1981) ("Imposing strict liability for unavoidable harm may indirectly affect a community adversely by leading area businesses to avoid useful, but dangerous activity."); Coleman, *The Morality of Strict Liability*, 18 WM. & MARY L. REV. 259 (1976). But see Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584, 588-89 (1981).

127 *Sturges v. Carter*, 114 U.S. 511, 519 (1885). Arguably, only the actual or threatened present release of hazardous substances triggers § 107 liability and, thus, this section presents no retroactivity problem. See *United States v. Price*, No. 80-4104 (D.N.J. Sept. 23, 1981) ("Because the gravamen of a [RCRA] section 7003 action is the current existence of a hazardous condition, not the past commission of any acts, we see no retroactivity problem with the statute."); *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980). Such an argument, however, misapprehends the nature of the retroactivity problem and assumes the answer to the question which is presented under § 107 when liability is sought to be imposed with respect to conduct antedating Superfund. At the time of such conduct, the parties had a reasonable expectation concerning the consequences of this conduct. See *State v. Ventron Corp.*, No. C2996-75 (N.J. Super Ct., Chan. Div. Aug. 27, 1979) ("the actions of the defendants must be measured as of the date they occurred"). To say that the 1980 application of § 107 liability to a party who transported wastes to a sanitary landfill in 1940 is not retroactive as it applies, because there is a present danger that these wastes may cause damage, is to all but eviscerate the limited retroactivity protections provided by the United States Constitution. See *Burgess v. Salmon*, 97 U.S. 381, 384-85 (1878); Annot., 53 L.Ed.2d 1146, 1153 (1977), and the fifth amendment, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976) ("The retrospective aspects of legislation, as well as the prospective aspects must meet the tests of due process, and the justifications for the latter may not suffice for the former.").

parties.¹²⁸

A statute will only be found to be unconstitutionally retroactive, however, if there is no rational interpretation of that statute which would avoid an unconstitutionally harsh application. Accordingly, defendants faced with a manifestly unjust retroactive application of Superfund will be able to invoke the savings provision of Superfund section 302.¹²⁹ At the time that such defendants engaged in the conduct which presently gives rise to Superfund liability, state and federal common law liability standards were in full force.¹³⁰ To the extent that these former standards and defenses were co-extensive with or more restrictive than those applied under Superfund, no constitutional issue is presented by the application of the Superfund standards. In such cases no new obligation or disability is being applied.¹³¹ To the extent that Superfund may apply a stricter standard with respect to such defendants, the section 302 savings clause obligates the courts to examine the state and federal law in effect at the time of the subject activity. The courts must then apply the standard which preserves as much of Superfund's remedial purposes as possible, while at the same time ensuring that the strict Superfund standards are not given an unconstitutionally retroactive effect.

It is beyond the scope of this article to provide a comprehensive examination of the state and federal law applicable to hazardous waste disposal activities. It is clear, however, that despite Superfund's pre-emption of federal common law in this area, the determination of the possibly unconstitutional retroactive application of Superfund's liability provisions may make this very federal common law essential in the resolution of key Superfund liability questions.

VI. Non-Superfund Liability Standards

Perhaps even more significant than the question of direct

128 *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974). Unconstitutionality results if "retroactivity inflicts a 'manifest injustice' considering (a) the nature of and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.* at 711.

Under Superfund, parties who engaged in conduct which met the highest possible safety standards could be subjected to liability without fault decades after their association with the hazardous waste activity ceased. The imposition of such liability upon parties whose conduct was not subject to any common law or statutory standard or prohibition would clearly violate "obvious justice." *Union Pacific R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913).

129 Superfund, *supra* note 5, § 302(d). See text accompanying note 114 *supra*.

130 See *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127, 1129 (D. Conn. 1980).

131 *Id.*

Superfund liability is the determination of hazardous waste liability claims not directly addressed by Superfund.¹³² Such claims would include all private actions seeking recovery for items which are not considered appropriate response costs under the National Contingency Plan.¹³³ It seems clear that the statute's pre-emption sections preclude any argument that, because private damage claims are not addressed in Superfund, they have been eliminated. The issue presented by such claims, however, is whether the applicable liability standard is to be found in Superfund, the federal common law or some other authority.

There is a strong consistency argument that all interstate hazardous waste disposal claims should be based upon Superfund's standards. Under such a system, the same liability standards would be applied for hazardous waste damage to either natural resources or private property. Congress, however, simply did not address the question of liability standards for releases of hazardous wastes which cause purely private injury.¹³⁴ Not only does Superfund contain no "direct action" provision, but private personal injury claims were quite specifically excluded from the expanded scope of liability and the restricted affirmative defenses under the Act.¹³⁵

There is, however, no need for consistency in determining liabil-

132 Determining precisely which claims are compensable under Superfund will not be an easy task. Direct Superfund recovery can be had for private and governmental response costs and for post-Superfund damages to natural resources. See Superfund, *supra* note 5, §§ 107(a), (f). Because of the delay of the National Contingency Plan, issues concerning the recovery of response costs have not yet even been formulated, let alone resolved. See note 75 *supra*.

In addition, claims for natural resource damages will present many problems. The EPA appears to be anxious to control the scope of private response and natural resource claims under the Act. EPA interim guidance reports on Superfund claims indicated that "pre-authorization" by the EPA will be required before a private party cleanup claim will be compensable. [Current Developments] ENVIR. REP. (BNA) 575 (Sept. 11, 1980).

Perhaps the principal issue which will arise with respect to the direct applicability of Superfund, however, is how groundwater damage is to be treated under this Act, and how damage to this resource is to be measured. While "groundwater" is included in the definition of "natural resources" under Superfund, it is limited to groundwater controlled by federal, state or local governments. Superfund, *supra* note 5, § 101(16). Whether the specific governmental interest in groundwater regulation will supplant all private claims in this crucial area is a question which is not answered by the meager legislative history of Superfund. See S. Rep. No. 96-848, 96th Cong., 2d Sess. 84 (1980). Ultimately, this question may turn largely on the state or local law applicable in the location where the groundwater pollution occurs or is threatened. See R. ZENER, GUIDE TO FEDERAL ENVIRONMENTAL LAW 377 (P.L.I. 1981); see generally David, *Groundwater Pollution: Case Law Theories For Relief*, 39 MO. L. REV. 117 (1974).

133 See notes 75-77 *supra*.

134 See note 109 *supra*.

135 See notes 55 & 56 *supra*.

ity for conduct which gives rise to very different types of damage. The burden imposed on a trial court might be reduced if the standards for injury to private property were the same as the standards of liability for natural resource damage under Superfund. The nature of the governmental interest in natural resources, however, is so different from purely private ownership claims that a different standard of liability is not without justification.¹³⁶ Consistency alone is an insufficient basis upon which to compel the application of Superfund liability standards with respect to claims not addressed by the statute.¹³⁷

In light of the potentially interstate character of the acts giving rise to private damage claims, it could be argued that liability for such claims should be determined under a federal common law nuisance theory which would be consistently applied throughout the United States.¹³⁸ In fact, however, the comprehensive nature of the problem Superfund addresses and the explicit federal legislative decisions which were made in addressing these problems all but preclude this determination.¹³⁹ *City of Milwaukee v. Illinois*¹⁴⁰ clearly stands for the proposition that areas in which there has been comprehensive federal environmental legislation are no longer governed by federal common law.

Thus, it seems that all liability questions in the hazardous waste disposal area which are not directly addressed by Superfund will be determined by applicable state statutory and common law.¹⁴¹ A full

136 See Note, *Federal Common Law and Water Pollution: Statutory Pre-emption or Preservation*, 49 FORD. L. REV. 500 (1981); see also W. PROSSER, TORTS 572-73 (4th ed. 1971) (discussion of different interests in public and private nuisance actions).

137 With respect to consistency, there is no federal interest in applying uniformity for its own sake. *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987, 993 (1980), cert. denied, 50 U.S.L.W. 3487 (U.S. Dec. 14, 1981); *Gulf Offshore Co. v. Mobil Oil Corp.*, 101 S. Ct. 2870 (1981) (no need for uniform interpretation of laws that vary from state to state).

138 See generally Stewart, *Pyramids of Sacrifice? Problems of Federalism In Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977); Annot., 29 A.L.R. FED. 137 (1976) ("Federal Common Law of Nuisance As Basis For Relief In Environmental Pollution Cases").

139 See *Gulf Offshore Co. v. Mobil Oil Corp.*, 101 S. Ct. 2870 (1981) ("The desirability of uniform interpretation . . . cannot support exclusive federal jurisdiction over claims whose governing rules are borrowed from state law. There is no need for uniform interpretation of laws that vary from State to State"). See note 10 *supra*.

140 101 S.Ct. 1784 (1981).

141 The determination of what state's common law is applicable to a particular dispute may, of course, raise problems. These problems, however, can be accommodated in the same manner as any other *Erie* conflict-of-laws dispute. Cf. *Gulf Offshore Co. v. Mobile Oil Corp.*, 101 S.Ct. 2870 (1981) ("State courts routinely exercise subject matter jurisdiction over civil cases arising from events in other States and governed by the other States' laws"); Gindler,

scale examination of the standards of liability which will be imposed under state law upon various parties for hazardous waste disposal activity is beyond the scope of this article.¹⁴² State courts have imposed liability for hazardous waste disposal conduct under theories of negligence,¹⁴³ nuisance¹⁴⁴ and strict liability.¹⁴⁵ In various factual settings, courts have imposed¹⁴⁶ or refused to impose¹⁴⁷ liability upon owners or operators of hazardous waste disposal sites. Some courts have permitted parties to escape liability by delegating duties to independent third-parties.¹⁴⁸ Other courts have rejected this defense.¹⁴⁹ In addition, a few courts have declared that significant hazardous waste disposal activity is so inherently dangerous that the imposition of strict liability is appropriate.¹⁵⁰

These decisions cannot be reconciled into a nationally consistent standard for determining liability for hazardous waste disposal conduct. The policy questions raised in hazardous waste disposal cases are complex, and often involve interests of parties who are not before the court.¹⁵¹ The decisions turn upon environmental, legal, social

Water Pollution and Quality Controls in 3 WATER & WATER RIGHTS § 210.1 at 38 (R. Clark ed. 1967); Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439, 1449 n.37 (1972) ("The states' lack of competence to apportion interstate waters can hardly be generalized as a lack of competence to regulate the quality of interstate waters. In interstate nuisance cases brought in diversity litigation, it is clear that state law will apply.").

142 See Note, *An Analysis of Common Law and Statutory Remedies For Hazardous Waste Injuries*, 12 RUTGERS L.J. 117 (1980); Comment, *Love Canal: Common Law Approaches to a Modern Tragedy*, 11 ENV'T'L L. 133 (1981).

143 See, e.g., *Iverson v. Vint*, 243 Iowa 949, 54 N.W.2d 494 (1952).

144 See, e.g., *Ewell v. Petro Processors of La., Inc.*, 364 So. 2d 604 (Ct. App. 1978), *cert. denied*, 366 So. 2d 575 (La. 1979). See also Note, *Hazardous Wastes: Preserving the Nuisance Remedy*, 33 STAN. L. REV. 675 (1981); Comment, *A Private Nuisance Approach to Hazardous Waste Disposal Sites*, 7 OHIO N. U.L. REV. 86 (1980).

145 See, e.g., *City of Bridgeton v. B.P. Oil Co.*, 146 N.J. Super. 169, 369 A.2d 49 (1976); see also Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584 (1981); Note, *Strict Liability for Generators, Transporters and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949 (1981).

146 See, e.g., *State v. Ventron Corp.*, No. C-2996-75 (N.J. Super. Ct., Chan. Div. Aug. 27, 1979); *Meadowlark Farms, Inc. v. Illinois Pollution Control*, 17 Ill. App. 3d 881, 208 N.E.2d 829 (1974).

147 See, e.g., *State v. Exxon Corp.*, 151 N.J. Super. 464, 376 A.2d 1339 (1977); *Tennessee Coal Iron & R. v. Hortiline*, 224 Ala. 116, 11 So. 2d 833 (1943).

148 See, e.g., *McLane v. Northwest Natural Gas Co.*, 225 Or. 324, 467 P.2d 635 (1970). See also RESTATEMENT (SECOND) OF TORTS § 427B (1977).

149 See, e.g., *Ewell v. Petro Processors, Inc.*, 364 So. 2d 604 (Ct. App. 1978), *cert. denied*, 366 So. 2d 575 (La. 1979).

150 See note 145 *supra*. But see *Ewell v. Petro Processors, Inc.*, 364 So. 2d 604 (Ct. App. 1978), *cert. denied*, 366 So. 2d 575 (La. 1979); *Hudson v. Peavey Oil Co.*, 279 Or. 3, 566 P.2d 175 (1977); *Boroughs v. Joiner*, 337 So. 2d 340 (Ala. 1976).

151 See Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439, 1453

and economic concerns which are both general and parochial. Many states have environmental statutes which justify imposing liability standards for hazardous waste disposal activity which may in some respects be far more punitive than any imposed under the federal common law.¹⁵² Other states have found common law rights or duties which would drastically reduce the burdens which would have been applied to a party subject to liability under the federal common law.¹⁵³

At this time, it cannot be determined how such non-Superfund hazardous waste disposal issues will ultimately be determined under state common law and statutory principles, and whether such determinations will result in consistent liability findings. Despite this uncertainty, however, it is the states which are the ultimate definers and protectors of their citizens' rights.¹⁵⁴ Where Congress has decided not to act in regard to private hazardous waste causes of action, it is for state statutes and state common law doctrines to resolve questions concerning liability for hazardous waste disposal activity.¹⁵⁵ It is

(1972) (in environmental cases "the interests are too diverse and numerous to be represented in court at the same time").

152 See notes 3 & 115 *supra*; see also FLA. STAT. ANN. § 376.011-21 (West Cum. Supp. 1981). Many states have what may be called general criminal statutes which, while never previously applied in the environmental context, may provide a basis for more stringent state standards. Compare 42 U.S.C. § 6928(e)(1)(B) with N.Y. PENAL LAW § 240.45 (McKinney 1980) (criminal nuisance) and N.Y. PENAL LAW § 120.24 (McKinney 1980) (reckless endangerment).

153 See, e.g., Department of Env't Quality v. Chemical Waste Storage & Disposition, Inc., 19 Or. App. 712, 719, 528 P.2d 1076, 1081 (1974); Curry Coal v. Arnoni, 439 Pa. 114, 119-20, 266 A.2d 678, 681 (1970); Fritz v. E.I. duPont de Nemours & Co., 45 Del. 427, 437-38, 75 A.2d 256, 261 (1950); Turner v. Big Lake Oil Co., 128 Tex. 155, S.W.2d 221 (1936). Compare RESTATEMENT (SECOND) OF TORTS § 821B, Comment d (1977) with W. PROSSER, TORTS § 88 (4th ed. 1971). In addition, of course, state applications of other common law concepts could result in victims of hazardous waste disposal activity being denied compensation. Cf. Note, *Liability For Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 GEO. L.J. 1015, 1063 (1981) (three of the six Restatement criteria tend to favor the defendant in a strict liability action for improper hazardous disposal).

154 See Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957); McRae, *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27, 37 (1948); see generally W. PROSSER, TORTS § 3 (4th ed. 1971).

155 See note 103 *supra*; see generally Stewart, *Pyramids of Sacrifice? Problems of Federalism In Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1219-20 (1977) (uniform federal environmental programs impose unnecessary or excessive economic and social costs on some areas); Comment, *Preemption Doctrine in the Environmental Context*, 127 U. PA. L. REV. 197, 213 (1978) (each area of the country has its own particular needs and priorities which require a diversity of regulation); Note, *State Environmental Protection Legislation and The Commerce Clause*, 87 HARV. L. REV. 1762, 1763 (1974) (states can be flexible in formulating standards best suited to the needs of the state and its citizens). But see Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439, 1452-53 (1972):

only in this way that liability problems which Congress has decided were not appropriate for resolution under federal law can be resolved in accordance with the laws and policies of the parties who are most directly affected by these activities.¹⁵⁶

VII. Conclusion

The federal common law was beginning to provide a means of circumventing the difficulties of implementing federal statutory enforcement schemes in hazardous waste disposal activity.¹⁵⁷ It is somewhat anomalous that Congress, by enacting Superfund, deprived claimants of federal common law remedies which would almost certainly have been available to them but for the enactment of this statute.¹⁵⁸ Superfund, however, was a congressional compromise in the area of hazardous waste control. Just as it deprived claimants of their ability to rely upon federal common law doctrines to impose liability for hazardous waste disposal conduct, it also deprived certain defendants of federal common law defenses which might otherwise have been available to them.

In essence, Superfund has complicated hazardous waste litiga-

Case-by-case adjudication is fundamentally inadequate to consider and weigh properly the many and varied interests environmental standards must reflect and thus to contribute to the type of comprehensive planning necessary for environmental control . . . courts will merely apply the analytical touchstones of the common law, such as reasonableness and fault, on a case-by-case, without formulating them with the specificity and complexity requisite for comprehensive lawmaking in the environmental area.

156 Solid waste disposal activity is traditionally a matter of purely local concern. *See* 122 CONG. REC. S11,071 (daily ed. June 30, 1976) ("solid waste is a problem best dealt with by local and State governments") (remarks of Sen. Stafford); *id.* at S11,072 ("solid waste management should be primarily a state and local concern") (remarks of Sen. Baker); note 98 *supra*.

Once the direct liability provisions of Superfund are given effect, *see* notes 115-23 *supra*, questions concerning the standard of civil liability to be imposed upon private parties implicate no significant federal concerns. *See* Note, *Federal Common Law and Water Pollution; Statutory Pre-emption or Preservation?*, 49 FORD. L. REV. 500, 522 (1981) ("The question whether private parties may obtain damages involves the federal interest only insofar as it might be thought to advance indirectly pollution control. The federal interest in a damage action, however, is so remote and speculative that no significant conflict exists and use of state law is appropriate.").

157 *See, e.g.,* *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980).

158 *Middlesex County v. National Sea Clammers*, 101 S. Ct. 2615 (1981). As Justice Stevens said in dissent:

The net effect of the Court's analysis of the legislative intent is therefore a conclusion that Congress, by enacting the Clean Water Act and the MPRSA, deliberately deprived respondents of effective federal remedies that would otherwise have been available to them. In my judgment, the language of both statutes, as well as their legislative history, belies this improbable conclusion.

Id. at 2630. (Stevens, J., dissenting).

tion by (1) setting ambiguous prospective standards, (2) requiring analysis of all formerly applicable state and federal standards to determine the constitutionality of any retrospective application of these new standards, and (3) making non-Superfund claims subject to state, rather than federal, rules of decision. There are, however, means by which the federal courts can minimize these complications.¹⁵⁹ Even more importantly, such complications will arise only in the effort to ensure a fair application of appropriate standards to those subject to the act and to ensure that these standards are determined in compliance with the laws which the jurisdictions most closely affected by this conduct have chosen to apply.¹⁶⁰ Complications such as these are precisely what our federal system was designed to preserve, not to eliminate.

159 For example, federal courts in non-diversity cases could refuse to entertain state law claims not properly before the court. *See* *United States v. Town of North Hempstead*, 610 F.2d 1025 (2d Cir. 1979). *Cf.* *United States v. Cargill, Inc.*, 508 F. Supp. 734 (D. Del. 1981) (staying federal Clean Water Act proceeding pending resolution of related state matter); *Mabray v. Velsicol Chem. Corp.*, 480 F. Supp. 1240 (W.D. Tenn. 1979) (refusing to permit federal question removal of private hazardous waste damage action).

160 *See* note 154 *supra*.